87-1733

Supreme Court, U.S.
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NO. A-410

TERM: OCTOBER, 1987

In the

SUPREME COURT OF THE UNITED STATES

William C. Sampson and Lucille A. Sampson,
Petitioners,

vs.

Commissioner of Internal Revenue, Respondent.

On Appeal from the United States Court of
Appeals for the Sixth Circuit

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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WILLIAM C. SAMPSON
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QUESTION PRESENTED FOR REVIEW

1. Whether the Rules of Practice and Procedure for the United States Tax Court are so deficient in the area of joinder and intervention of parties with an interest in the case, as to deprive litigants of their fundamental right of due process under the 5th Amendment, United States Constitution.

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2. Sampson, et ux v. Commissioner, United States Tax Court Docket No. 3394-81, T.C. Memo. 1986-231, 51 T.C.M. 1148, Filed June 9, 1986

3. Sampson, et ux v. Commissioner, United States Tax Court Docket No. 3394-81, 81 T.C. 614, Tax Court Regular Opinion Filed September 22, 1983

4. Sampson, et ux v. Commissioner, Sixth Circuit Docket No. 82-1373, 710 F.2d 262 (6th Cir. 1983)

NO. A-410

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In the

SUPREME COURT OF THE UNITED STATES

William C. Sampson and Lucille A. Sampson, Petitioners,

vs.

Commissioner of Internal Revenue, Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals for the
Sixth Circuit

Petitioners request that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the United States Tax Court.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1), providing for appeals by certiorari to the Supreme Court from

the order or judgment of a court of appeals in a criminal or civil case. This is a civil case originating in the United States Tax Court.

The Per Curiam Opinion of the Sixth Circuit Court of Appeals affirming the Tax Court decision was filed on September 21, 1987, and a copy of the same is incorporated herein as Appendix A.

The Notice of Appeal was filed with the Clerk of the Sixth Circuit Court of Appeals on or about the 16th of May, 1987.

28 U.S.C. §2101(c) provides, in part:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after such judgment or decree.* * *"

Accord: Rule 20.2, Rules of the Supreme Court of the United States.

The Per Curiam Opinion of the Sixth Circuit was filed on September 21, 1987, making

this Petition due to be filed on or before December 21, 1987 (December 20th is a Sunday). This Petition is, therefore, filed in a timely manner, thus giving this Court jurisdiction.

Jurisdiction is further invoked under Article III, Section 2 of the Constitution of the United States, and under 28 U.S.C. §1254(1), relating to review of decisions of a Court of Appeals in civil cases by certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions —

Amendment 5, United States Constitution provides in part:

> "No person shall. . .be deprived of life, liberty, or property, without due process of law; . . ."

Statutory Provisions —

Internal Revenue Code of 1954,[1] section 671, provides in part:

> "Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against the tax of the trust which are attributable to that portion of the trust to the extent

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[1] References to the "Code" are to the Internal Revenue Code of 1954, Title 26, United States Code, as in effect at the time or times in question here.

that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual.* * *"

Code section 672 states in part:

"(a) Adverse Party — For purposes of this subpart, the term 'adverse party' means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possess respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

"(b) Nonadverse Party — For purposes of this subpart, the term 'nonadverse party' means any person who is not an adverse party."

Code section 674 provides in part:

"(a) General Rule -- The grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus of the income therefrom is subject to a power or disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any

adverse party."

Code section 6213 states in part:

"(a) Time for Filing Petition and Restriction on Assessment — Within 90 days or 150 days, if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed. . .the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.* * *"

Ohio Revised Code, Chapter 1785, relating to Professional Associations, at §1785.02 holds in part:

"An individual or group of individuals each of whom is licensed or otherwise legally authorized to render the same kind of professional service within this state, or a group of individuals each of whom is licensed or otherwise authorized to render the professional service within this state authorized under either Chapter 4703 or 4733, of the Revised Code, may organize and become a shareholder, or shareholders, of a professional association.* * *"

Ohio Revised Code, §1785.03 stipulates,

in part:

> "A professional association may render professional service only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service within this state.* * *"

Ohio Revised Code, §1785.05, provides:

> "A professional association may issue its capital stock only to persons who are duly licensed or otherwise legally authorized to render the same professional service as that for which the association was organized."

STATEMENT OF THE CASE

A. Disposition Below --

Adjudication of the this matter commenced on January 26, 1981, when the Internal Revenue Service (herein after "Respondent") issued to William C. and Lucille A. Sampson (herein after "Petitioners") a notice of deficiency under 26 U.S.C. §6213, alleging an underpayment in income taxes for the years 1975-1979 inclusive. A timely petition for redetermination was filed with the Tax Court on February 23, 1981. Such petition formed the basis of original jurisdiction in this matter.

The notice of deficiency alleged that the trust established by Lucille A. Sampson, known as the "Lucille A. Sampson Pure Equity Trust," (herein after "the Trust") was not the owner of income it claimed on its forms 1041 for the years in question, but rather that the income was owned by William C. Sampson, individually. The notice of deficiency alleged that the Trust was a

grantor trust under 26 USC §671, and that accordingly, the income was rightfully that of William C. Sampson, who was alleged in the notice to have earned the income.

The Trust was not named in the notice of deficiency, nor were any trustees or beneficiaries named by the Respondent in the notice of deficiency. In addition, Respondent did not name in the notice of deficiency W. Clifford Sampson, Inc., a professional corporation (herein after "the Corporation") organized under Chapter 1785 of the Ohio Revised Code.

Trial of this matter was set for May 24, 1982, before the Tax Court, but before the hearing could commence, Bruce Alan Sampson and Dianne M. Sampson, (herein after "Trustees") both children of the Petitioners and Trustees of the Trust, retained separate counsel, licensed to practice law and admitted to bar of the United States Tax Court, and filed a motion for leave to intervene in the proceeding before the Tax Court.

In the Declaration of Counsel and Petition of Lucille A. Sampson Pure Equity Trust to Intervene, counsel stated that no notice of deficiency had been issued to the Trust, yet the issues in the notice mailed to the Petitioner raised questions which stood to substantially impact the rights of the Trustees and Beneficiaries of the Trust.

The Petition to Intervene was denied by the Tax Court on May 12, 1982, without comment. An interlocutory appeal was taken by the Trustees to the United States Court of Appeals for the Sixth Circuit. In their published opinion[2] filed June 23, 1983, the judgment of the Tax Court denying the Petition to Intervene was Vacated, and the cause Remanded for a determination on whether there were sufficient grounds to permit the Trust to intervene.

On remand, the Tax Court again denied the

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[2] See 710 F.2d 262 (6th Cir. 1983), and Appendix B.

Trust's Petition to Intervene, by order dated September 22, 1983. See 81 T.C. 614 (1983) and Appendix D. In its opinion, the Tax Court stated:

> "In seeking to intervene herein, the Trust is seeking to inject into the present case issues relating 'to the rights and interests of the Trust, particularly, questions which address the very existence and propriety of the Trust.' The Trust also seeks to raise issues herein concerning the individual property rights and interests of trustees and beneficiaries, presumably including the present petitioners, in and to trust property. None of these matters, however, are properly before this Court as issues, nor do they form a necessary part of any of the issues which we must decide in rendering a decision in this case." (Footnotes omitted.) Appendix D.

The Court went on to hold that "the rights of the various trustees and beneficiaries thereof under state law, are not determinative of the Federal income tax results with respect to the alleged trust income. The Trust here may or may not be valid and enforceable under state law,

and the income allegedly reported by it may be distributable as a state court may determine in a proper proceeding, but state property law is not controlling as to who should pay the Federal tax on the income derived from such property." (Citations omitted.) Ibid.

Both prior and subsequent to the above-mentioned holding, the parties engaged in discovery and filed several motions, including motions for summary judgment. All motions were disposed of by the Tax Court prior to trial. On February 14, 1986, trial was held in Cincinnati, Ohio, before the Honorable L. W. Hamblen, Jr., Tax Court Trial Judge. On June 9, 1986, Judge Hamblen filed his memorandum decision[3] affirming the Respondent's deficiency determination in all particulars.

An appeal was taken by the Petitioners to the United States Court of Appeals for the Sixth

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[3] See T.C. Memo. 1986-231, 51 T.C.M. 1148, and Appendix C.

Circuit. On September 21, 1987, the Sixth Circuit rendered its unpublished Per Curiam opinion arfirming in all respects the decision or the Tax Court. The Petitioners did not seek rehearing en banc or request reconsideration by the Sixth Circuit.

This appeal was commenced by the filing of a notice of appeal with the Clerk of the Sixth Circuit on November 16th, 1987. Petitioners, on that same date, requested an Extension of Time of 60 days in which to submit the herein Petition. By Order dated November 24, 1987, Justice Scalia denied such application.

B. Facts —

In April of 1975, Petitioner Lucille A. Sampson created the Lucille A. Sampson Pure Equity Trust. At the time of the Trust's creation, Mrs. Sampson gifted her personal

residence, owned by her solely,[4] to the Trust to be held for the beneficiaries. Both Petitioners' were named as the original trustees, and as their children Bruce and Dianne came of age, they were added as trustees. All were beneficiaries at all times. Bruce Sampson was born in October of 1955, and Dianne was born in February of 1958.

In September of 1975, William C. Sampson created, under Ohio's professional association statutes, a professional corporation known as W. Clifford Sampson, Inc., organized for the purposes of rendering medical services in the State of Ohio. Mr. Sampson is a duly licensed Osteopathic Physician. Mr. Sampson is the sole shareholder of the corporation consistent with Ohio Revised Code §1785.05. Both Mr. and Mrs.

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[4] The fact that Mrs. Sampson owned the home as her sole property when it was gifted to the trust was not adduced at the trial of this matter. Rather, this fact is a part of the official record in the case of Sampson v. Commissioner, Tax Court Docket No. 14039-84. That case, while unconnected with the instant proceeding, raises similar issues for later tax years.

Sampson are directors of the corporation.

After having been created under Ohio law, and in a timely manner, the corporation elected to be treated as a "small business corporation" under subchapter S of the Internal Revenue Code. All appropriate forms and notices were filed with the IRS.

On April 10, 1975, Mr. Sampson, individually, entered into a contract with the Trust. Under said contract, Mr. Sampson was to make his personal services available to the Trust so that he may perform Osteopathic services on behalf of the Trust, both parties knowing full well that the Trust itself did not have a license to perform such services. See Ohio Revised Code §1785.03. For an in consideration of such services, the Trust was to provide Mr. Sampson with the following:

> "a. The use of the TRUST properties with paid utilities and living and working quarters for other uses than TRUST use(,)

"b. The use of a telephone listed in his name for other than TRUST business, and payment of the telephone bill(, and)

"c. The use of a leased automobile for other than TRUST business." (Contract reproduced in Sixth Circuit Joint Appendix, page 49.)

On the 16th day of September, 1975, after the W. Clifford Sampson, Inc. professional corporation had been created and the subchapter S election had been made and executed, the Trust entered into a contract with the corporation. Under the terms of the contract, the Trust was to provide the medical services of Mr. Sampson, which it owned under the terms of the April 10, 1975, contract, to the corporation that it may be in compliance with Ohio Revised Code §1785.03. For and in consideration of providing said services, the corporation was to provide the trust with a fee equaling

"82% per annum of the income earned for the COMPANY (corporation) by W.C. Sampson. That fee, in part or in whole, shall be paid on demand of the

> TRUST. Any modification of this fee shall be in writing and agreed to by both parties." See Sixth Circuit Joint Appendix, page 50.

At the close of tax year 1975, and for each tax year thereafter,[5] the Trust filed forms 1041 reporting its income from the contract between it and the corporation. The corporation filed forms 1120S reporting its income earned from the services it purchased from the Trust. And Petitioners filed personal tax returns form 1040 reporting their income from Trust distributions. Sixth Circuit Joint Appendix, pages 79-96.

The Trust also made distributions to the remaining beneficiaries, Bruce and Dianne Sampson, who reported that income on their personal returns. Ibid. However, neither the Trust, nor Bruce and Dianne received a notice of deficiency, whether personally or as trustees or beneficiaries of the Trust. This fact is

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[5] Tax years 1975-1979 are at issue herein.

uncontested, and was pointed out by the Sixth Circuit in its opinion vacating and remanding the Tax Court's first order denying the Trust's motion to intervene. See 710 F.2d 262, Appendix B.

In its ultimate decision on the merits of this case, the Tax Court held that the Trust was a grantor trust under 26 USC §671, and that accordingly, the income was to be attributed not to the Trust, but rather to the grantor.[6]

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[6] This finding defies the fact that Mrs. Sampson, not Mr. Sampson was the grantor of the Trust. Furthermore, Mr. Sampson, not Mrs. Sampson, actually performed the services in question.

REASON FOR GRANTING THE WRIT

1. The Rules of Practice and Procedure for the United States Tax Court are so deficient in the area of joinder and intervention of parties with an interest in the case, as to deprive these Petitioners of their fundamental right of due process under the 5th Amendment, United States Constitution.

ARGUMENT:

The Rules of Practice for the United States Tax Court make no provision for the intervention of interested parties, or for the joinder of indispensable parties.[7] The absence of such rules makes it all but impossible for interested parties to intervene in a case before the Tax Court, the result of which can be, and was in this case, a deprivation of due process under the 5th Amendment.

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[7] The only exception to this claim is found at Rules 215 and 216. These rules do allow interested parties to intervene, and do provide for the joinder of indispensable parties, but only in cases involving retirement plan issues.

Petitioners believe, based upon their research, and state in good faith, that the question of this void in the Tax Court's rules on this account has never been passed upon by this Court.[8] Consequently, the Sixth Circuit's opinion in this matter is a question of federal law which has never been, but should be, settled by the Supreme Court.[9] Moreover, the absence of such rules constitutes a departure from the accepted and usual course of civil proceedings, so as to call for an exercise of the Supreme Court's power of supervision.[10]

Rule 19, Federal Rules of Civil Procedure, provides in part, as follows:

> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a

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[8] A brief discussion of the cases follows, infra.

[9] Supreme Court Rule 17.1(c).

[10] Supreme Court Rule 17.1(a).

party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.* * *"

Rule 20, Federal Rules of Civil Procedure, provides in part:

"(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.* * *"

And finally, Rule 24, Federal Rules of Civil Procedure, holds in part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense in the main action have a question of law or fact in common.* * *"

These rules, taken together, provide the courts and the litigants with the means to ensure that justice will be done in each case brought into the federal system. The Tax Court, however, as long held that access to it is limited only to those who have received a notice of deficiency under 26 USC §6213(a). Without a notice, the

court claims it has no jurisdiction over a party. **Burns, Stix Friedman & Co. v. Commissioner**, 57 T.C. 392 (1971), **Cincinnati Transit v. Commissioner**, 55 T.C. 879 (1971), approved 445 F.2d 220 (6th Cir. 1972).

But certainly, in a tax case, as in all other matters, there are occasions where individuals other than the primary litigants have an interest which will or stands to be affected by the outcome of pending litigation. The Tax Court has spoken to this concern, but not in a manner so nearly as clear as that provided by the federal civil rules for the district courts.

The Tax Court has held in this and other cases that under no circumstances can a party who has not received a notice of deficiency intervene as a party-petitioner, as one would under Rule 24(a), FRCvP. See **Cincinnati Transit**, supra. "Intervention" is limited, the courts say, to permitting a party to "file an amicus brief to protect its interests, which we think would be discretionary at best under the circumstances. .

." Ibid, 55 T.C. at 883. See also the decision of the tax court in this case, Appendix D.

Under the law as settled by the Tax Court and various courts of appeals, intervention in the tax court is purely "discretionary," and under no circumstances, can one intervene as a "party-petitioner." See **Cincinnati Transit**, supra, **Estate of Smith v. Commissioner**, 77 T.C. 236 (1981); **Estate of Dixon v. Commissioner**, 666 F.2d 386 (9th Cir. 1982).

The instant case involved the legality of a trust for federal tax purposes, the trustees of which attempted to intervene as party-petitioners, or at least, sought the right to submit an amicus brief. The Tax Court determined that none of the concerns they expressed in their intervention petition were before the court. Their request to intervene was denied. But the problem with the court's exercise or its discretion in this matter, is that they are unguided -- unlike the federal district courts -- by any objective standards

through which a fair determination of the question can be made. Rules 19, 20 and 24, FRCvP provide specifics which the courts can and do look to in determining whether intervention or joinder is appropriate in a particular case.

One such standard, absent from the Tax Court Rules but which surely comes into play here, is found at Rule 19(a), where we read joinder is appropriate where failure to do so would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The present case resulted in the Petitioners being assessed additional tax liabilities based upon the court's holding that the trust was a "grantor trust." Yet it was a fact[11] that much of the Trust income was distributed to the beneficiaries, two of whom

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[11] See Sixth Circuit Joint Appendix pages 79-96.

sought to intervene but were denied. Those beneficiaries (also trustees) filed income tax returns and paid tax upon those distributions.

Still, the Tax Court's opinion discounted those distributions and made the Petitioners liable to pay the tax on those distributions. The result: double taxation, or, in the language of Rule 19(a)(ii), "double, multiple or otherwise inconsistent obligations" were heaped upon these Petitioners by reason of the lack of objective standards against which the Tax Court could judge the Trustee's rights to intervene.

As stated earlier, to the best knowledge of these Petitioners, the Supreme Court has not yet heard the issue nor passed upon the merits of the contentions asserted here. The leading cases on the matters have gone only to the appellate court level. For example, in **Cincinnati Transit**, supra, a petition for writ of certiorari was filed but denied at 289 U.S. 754. No petition for writ of certiorari was sought in the 9th Circuit's decision in **Estate of Dixon v.**

Commissioner, supra.

Anotner case in accord with those cited is out of the 5th Circuit, and is **Levy Trust v. Commissioner**, 341 F 2d 93 (5th Cir. 1965). Certiorari was not sought in that matter. In anotner 9th Circuit decision, **May v. Commissioner**, 553 F.2d 1207 (9th Cir. 1977), no action beyond the 9th Circuit was taken by the litigants. Similarly, in **Estate of Smith v. Commissioner**, 77 T.C. 326 (1981), no appeal was taken from the Tax Court's decision.

These cases are all in accord with the proposition that 1) there is no right of an applicant to become a party-petitioner in a Tax Court case, and 2) that the matter of intervention is solely within the discretion of the court to permit or deny.

This line of cases has gone unreviewed by this Court, and as such, leaves what these Petitioners believe to be a gaping hole in the rules of the Tax Court such that one's 5th Amendment right to due process is seriously

jeopardized by unreasonably limiting and in many cases, such as this one, preventing access to the Tax Court for redress and protection of one's substantive property rights.

Such a gap is a serious departure from the accepted and usual course of judicial procedure. The federal civil rules, as shown above, provide the template from which the Tax Court should draw. We believe that it is entirely appropriate and timely for this Court to grant certiorari to review and settle the question of intervention and joinder in a case before the United States Tax Court. The issue presented here has not yet been addressed by this Court.

WHEREFORE, the herein Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Dated this 10th day of December, 1987.

Respectfully submitted:

WILLIAM C. SAMPSON
LUCILLE A. SAMPSON

Petitioners pro se
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513-422-5115

AFFIDAVIT OF SERVICE

I, WILLIAM C. SAMPSON, being first duly sworn on oath, depose and state that I am one of the Petitioners in this case, and that on the _____ day of December, 1987, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the United States of America, by mailing the same to:

Solicitor General
Department of Justice
Washington, D.C. 20044

and

Michael L. Paup
Chief, Appellate Section
Department of Justice
Tax Division
Washington, D.C. 20044

_____

William C. Sampson

_____

Notary Public

My Commission expires: _____

APPENDIX

NOT FOR PUBLICATION

NO. 87-1186

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM C. SAMPSON and LUCILLE A. SAMPSON,	)	
Petitioner-Appellants,	)	ON APPEAL FROM THE UNITED STATES TAX COURT
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellee.	)	

BEFORE: GUY and BOGGS, Circuit Judges; and SUHRHEINRICH, District Judge.[1]

PER CURIAM. William and Lucille Sampson appeal the decision of the Tax Court holding them liable for deficiencies in personal income tax for the years 1975-1979. William was a self-employed osteopath. In September 1975, he formed a professional corporation, W. Clifford Sampson, Inc. He was president, sole shareholder and only

[1] Honorable Richard F. Suhrheinrich, United States District Judge for the Eastern District of Michigan, sitting by designation.

employee. In April 1975, Lucille established the "Lucille A. Sampson Pure Equity Trust" and transferred the family home to the trust. William, Lucille and their two children were the trustees and the only beneficiaries of the trust. The trust executed a contract, first with William personally, and later with the corporation, whereby William agreed to render his services for the benefit of the trust in exchange for living and working quarters.

During the years in question, the trust filed income tax returns showing business income and receipts from William's osteopathic services, but also deducted the personal home expenses as business expenses so that the trust reported no taxable income for any of those years. William and Lucille filed joint returns for those years showing very little taxable income.

On January 26, 1981, the Commissioner issued a notice of deficiency to the Sampsons, including a negligence penalty under 26 USC §6653(a). They filed a petition in Tax Court

disputing the deficiencies. After certain procedural shirmishes and an interlocutory appeal, the case was tried before the Tax Court in February 1986. The court held that the purported family trust was a sham tax avoidance scheme which could not shift the incidence of tax on the income earned by William to the trust. The court affirmed the full amount of the deficiencies assessed by the Commissioner including the negligence penalty.

The Sampsons' arguments on appeal are meritless. It is settled law that an anticipatory assignment of income such as William made to the trust in this case will not operate to shift the tax liability of that income. Lucas v. Earl, 281 U.S. 111 (1930). The circuit courts have uniformly held that these types of family trust schemes will not relieve the income earner of paying tax on the income. See e.g. Whitesel v. C.I.R., T.C. Memo 1983-9, afrd. without published opinion, 745 F.2d 59 (6th Cir. 1984); Hanson v. C.I.R., 696 F.2d 1232 (9th Cir. 1983);

Schulz v. C.I.R., 686 F.2d 490 (7th Cir. 1982).

Accordingly, we affirm the Tax Court's decision on the basis of Judge Hamblen's opinion, T.C. Memo (June 9, 1986).

APPENDIX B

William C. SAMPSON and Lucille A. Sampson, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 82-1373

United States Court of Appeals, Sixth Circuit

Argued May 17, 1983.
Decided June 23, 1983.

Before CONTIE and KRUPANSKY, Circuit Judges, and GUY, District Judge.[1]

PER CURIAM

The Lucille A. Sampson Pure Equity Trust (Trust) appeals the Tax Court's denial of a petition to intervene in tax deficiency litigation between the Commissioner of Internal Revenue and William and Lucille Sampson. For the reasons stated below, we vacate the Tax Court's decision and remand for further proceedings.

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[1] The Honorable Ralph B. Guy, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

The Commissioner sent a notice of deficiency to William and Lucille Sampson in their individual capacities. The Sampsons, who also are trustees of the Trust, allegedly had attempted to avoid paying income tax by attributing portions of their income to the Trust. Two other trustees, Bruce and Diane Sampson, induced the Trust to attempt to intervene on grounds that the Trust's validity was threatened and that their personal interests were adverse to those of the original parties in the case. Since the Tax Court denied the petition to intervene in a margin entry, we are unable to determine the grounds upon which it acted.

The first issue requiring discussion is whether the Tax Court's ruling is immediately appealable. 26 USC §7482(a) gives this court jurisdiction to review "decisions" of the court. The Commissioner contends that the term "decision" extends only to dismissals by the Tax Court and to findings of the presence or absence

of deficiencies. Cf. 26 USC §7459(c). Although some courts have accepted the Commissioner's argument, see, e.g., Commissioner v. Smith Paper, Inc., 222 F.2d 126 (1st Cir. 1955); Michael v. Commissioner, 56 F.2d 825 (2nd Cir. 1932), this court rejected it in Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961).

In Louisville Builders, the Tax Court ordered that a witness be deposed. This ruling was neither a dismissal nor a determination of the presence or absence of a deficiency. The court nevertheless held the order to be a "decision" both because the effect of the order would have been unreviewable had an appeal not then been permitted and because the order disposed of the entire case. Id. at 338-39. In the present litigation, the Trust will be unable to protect its right, if any, to intervene in the deficiency proceedings unless it is allowed to appeal now. Moreover, the Tax Court's ruling disposed of the Trust's entire petition. Estate of Smith v.

Commissioner, 638 F.2d 665, 668 (3rd Cir. 1981). Accordingly, we join the third and ninth circuits in holding that the Tax Court's denial of a petition to intervene is an appealable "decision" within the meaning of 26 USC §7482(a). Estate of Dixon v. Commissioner, 666 F.2d 386 (9th Cir. 1982); Estate of Smith, supra.

Licavoli v. Commissioner, 318 F.2d 281 (6th Cir. 1963), cited by the Commissioner, is not to the contrary. The court held in Licavoli that interlocutory orders of the Tax Court, such as striking replies or affirmative defenses, are not appealable "decisions" under §7482(a). The court noted that since such rulings may be appealed along with the final decision in a tax case, the concern expressed in Louisville Builders about unreviewable order was not present. In the matter at bar, the Tax Court's ruling was not interlocutory because the Trust's entire petition was rejected and because the Trust will not be able to protect any right it may have to intervene in the proceedings below if an appeal

must await the outcome of those proceedings. Our holding in this case is therefore consistent with Licavoli.

On the merits, the Commissioner contends that the Tax Court properly denied the Trust's petition because that court has no power to permit intervention by persons or entities who have not been served with notices of deficiency. Cf. 26 USC §6213(a) (only persons receiving notice may petition for redetermination of a deficiency). It is undisputed that the Trust has never received such a notice.

The rule in this circuit is that persons or entities to whom deficiency notices have not been addressed may not petition for redetermination of a deficiency. Cincinnati Transit, Inc. v. Commissioner, 455 F.2d 220 (6th Cir. 1972). The court distinguished, however, between a petition for redetermination of a deficiency and a petition to intervene in a redetermination action filed by another person. The court also implied in dictum that the Tax Court has discretion to

allow intervention under appropriate circumstances. We now adopt the dictum in Cincinnati Transit and hold that the Tax Court has power to permit intervention by persons or entities who have not been served with notices of deficiency. The Tax Court's decisions on intervention questions shall be reviewable under an abuse of discretion standard. See also, Estate of Dixon, 666 F.2d at 388; Levy Trust v. Commissioner, 341 F.2d 93, 94 & n. 2 (5th Cir. 1965). We emphasize that intervention is not a matter of right but rather is within the Tax Court's discretion.

As has been indicated, the margin entry which denied the Trust's petition to intervene does not reflect whether the Tax Court exercised its discretion or whether the court believed that it lacked the power to permit intervention. Consequently, the case must be remanded to the Tax Court with instructions to exercise its discretion and determine whether there are sufficient grounds for intervention.

The judgment of the Tax Court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX C

T. C. MEMO. 1986-231

UNITED STATES TAX COURT

WILLIAM C. SAMPSON AND LUCILLE A. SAMPSON, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent.

Docket No 3394-81 Filed June 9, 1986.

William C. Sampson and Lucille A. Sampson, pro se.

Nancy B. Herbert, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

HAMBLEN, Judge: Respondent determined deficiencies in petitioners' Federal income taxes and additions to the tax as follows:

		Additions to Tax	
Year	Deficiency	§6653(a)	§6654(a)
1975	$7,138.45	$356.92	$308.25
1976	7,653.49	382.67	272.79
1977	7,998.50	399.93	284.62
1978	6,665.70	333.29	212.79
1979	8,915.90	445.80	371.38

After concessions,[2] the issues for decision are (1) whether this Court has jurisdiction to make a determination when such determination requires consideration of a party who is not before the Court; (2) whether timely notices of deficiency were issued to petitioners for taxable years 1975 and 1976; (3) whether income reported on the Federal income tax returns of the Lucille A. Sampson Pure Equity Trust is properly reportable by petitioners on their Federal income tax returns for the years at issue; (4) whether petitioners are liable for self-employment taxes in the amount determined by respondent under

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[2] Petitioners expressly concede that the notice of deficiency issued by respondent for the taxable year 1977 was timely. In addition petitioners have not claimed error with respect to the investment tax credit amounts disallowed by respondent for taxable years 1976 through 1979, the trade or business expenses disallowed by respondent for taxable year 1975, or the depreciation deductions disallowed by respondent for taxable years 1977 through 1979. Consequently, these issues are deemed conceded. Rule 34(b)(4). In any event petitioners have introduced no evidence as to these items and have failed to meet their burden of proof. Rule 142(a).

section 1401 for each of the years at issue; (5) whether petitioners are liable for an addition to the tax under section 6653(a) for each of the years at issue; (6) whether petitioners are liable for an addition to the tax under section 6654 for each of the years at issue; and (7) whether damages should be awarded to the United States under section 6673.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Petitioners resided in Middletown, Ohio, when they filed their petition in this case.

Petitioner William C. Sampson ("William") practiced as an osteopath during the years at issue. William rendered his osteopathic services through W. Clifford Sampson, Inc. (the Corporation). The Corporation was incorporated on September 15, 1975. The Corporation filed Forms 1120, U.S. Corporation Income Tax Returns,

for the short taxable year September 15, 1975, through December 31, 1975, and thereafter for the successive calendar years through 1979. For the taxable year ending December 31, 1975, the Corporation reported "other deductions" nominated as "professional fees" in the amount of $6,500. In succeeding taxable years the Corporation reported the following amounts as "Cost of goods sold" nominated as "professional services" or "professional fees":

Year	Amount
1976	$23,765.24
1977	24,280.20
1978	24,296.00
1979	26,485.00

The corporation reported no taxable income for any of its taxable years through 1978 and reported $311.00 in taxable year 1979.

On April 1, 1975, petitioner Lucille A. Sampson ("Lucille"), as grantor, executed a trust

agreement.[3] The trust created by the agreement was nominated as "The Lucille A. Sampson Pure Equity Trust" (The Trust). The trustees named in the Trust agreement were Lelah M. Truxal and William. However, Lelah M. Truxal ceased to serve as a trustee and was replaced by Lucille and the two children of William and Lucille, Bruce and Diane. William, Lucille, Bruce and Diane served as trustees during each of the years at issue. These same persons were beneficiaries of the Trust during the years at issue.

The property transferred to the Trust on execution of the agreement was petitioners' residence. On April 10, 1975, the Trust purportedly executed an agreement with William. This document provided, in pertinent part:

The TRUST, realizing full well that it cannot

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[3] Our use of the term trust is not to be construed as a finding or holding that the Lucille A. Sampson Pure Equity Trust is a trust which is valid for either federal tax or State law purposes.

practise [sic] Osteopathy, wishes to obtain the services of Dr. W.C. Sampson as an Osteopathic Physician. Dr. W.C. Sampson desires to give his skill and expertise as an Osteopathic Physician to the Trust so that he may perform services on behalf of the TRUST.

The TRUST and Dr. W. C. Sampson do covenant and agree as follows:

1. The TRUST agrees to furnish the following to DR. W. C. Sampson for his services as an Osteopathic Physician to the TRUST.

a) The use of the TRUST properties with paid utilities for living and working quarters for other uses than TRUST use.

b) The use of a telephone listed in his name for other than TRUST business, and payment of the telephone bill.

c) The use of a leased automobile for other than TRUST business.

2. Dr. W. C. Sampson agrees to give his professional services to the TRUST for the above listed benefits of paragraph 1.

* * *

5. Dr. W. C. Sampson recognizes that the TRUST shall manage its business affairs exclusively and the relationship between the TRUST and Dr. W. C. Sampson shall be that of Independent Contractor.

On September 16, 1975, the Trust purportedly executed an agreement with the Corporation. This document provided, in pertinent part:

1. The TRUST agrees to furnish the expertise and knowledge of Dr. W. C. Sampson, D.O. to the

COMPANY. The COMPANY accepts the expertise and knowledge of Dr. W. C. Sampson, D.O. The services to be provided shall be understood by both parties to consist of the skills denoted an Osteopathic Physician licensed by the State of Ohio.

2. The COMPANY cannot control or supervise the work or services to be performed by Dr. W. C. Sampson. The TRUST agrees that Dr. W. C. Sampson shall devote his time and effort to the business of the COMPANY and all remuneration earned belongs to the COMPANY.

3. The TRUST shall be compensated for the services of Dr. W. C. Sampson to the COMPANY, a fee equaling 82% per annum of the income earned for the COMPANY by Dr. W. C. Sampson. That fee, in part or in whole, shall be paid on demand of the TRUST. Any modification of this fee shall be in writing and agreed to by both parties.

The Trust filed Form 1041, U.S. Fiduciary Income Tax Returns, for the short taxable year April 1, 1975, through December 31, 1975, and thereafter for the successive calendar years through 1979. In these returns the Trust reported the following amounts as income from the Corporation:

Year	Amount
1975	$12,500.00
1976	23,765.24
1977	24,280.20

1978	24,296.00
1979	26,485.00

In addition, the Trust report business receipts in the following amounts:

Year	Amount
1975	$18,049.70
1976	31,414.67
1977	38,222.73
1978	29,505.75
1979	28,993.00

During the same years the Trust claimed deductions relating to the maintenance and operation of the residence in which Petitioners lived and for medical expenses for petitioners and their family. The Trust also reported net distributions to the beneficiaries in the following amounts:

Year	William & Lucille	Children
1975	$1,958.69	$ 839.44
1976	8,389.79	3,595.64
1977	5,532.94	2,371.28
1978	4,314.00	1,848.00
1979	3,733.00	1,600.00

The Trust reported no taxable income in any of its taxable years through 1979. The 1975 and 1976 Trust Federal income tax returns were prepared by Jay Q. Truxal, C.P.A.

Petitioners filed timely, joint Forms 1040, U.S. Individual Income Tax Returns, for the years 1975 through 1979. On these returns petitioners reported income from trust distributions identical to the amounts reflected as distributions to them by the Trust. In 1975 petitioners also reported income from a trade or business in the amount of $5,646.29, and in 1979 petitioners also reported income from wages or salary in the amount of $1,960.00. The only other income reported in any of these years were small amounts of interest income, an estate distribution in the amount of $48.93, a taxable capital gain distribution in the amount of $2.00, and automobile rental income. William reported his occupation as doctor or osteopath on each return. Petitioners' 1975 and 1976 Federal income tax returns were prepared by Jay Q.

Truxal, C.P.A.

On January 26, 1981, respondent issued a notice of deficiency to petitioners relating to taxable years 1975 through 1979. The deficiencies reflected in the notice of deficiency were, in substantial part, due to income which respondent maintains was improperly reported by the Trust. The income which respondent determined should have been reported by petitioners and not by the Trust was identical in amount to the income reported on the Trust returns without reduction except for the cost of merchandise.

In their petition filed on February 23, 1981, Petitioners claimed that the full amount of the deficiencies and additions to tax determined by respondent are in controversy but did not present clear and concise assignments of error committed by respondent nor any facts on which such error might be based. Instead petitioners raised meritless arguments regarding the purported Constitutional "errors" committed by respondent

and the "arbitrary" and "capricious" actions of respondent. The only issue of any merit raised in the petition is the timeliness of the notice of deficiency for the years 1975 through 1977.

As the case progressed, petitioners failed to make any meaningful attempt to cooperate in preparing this case for trial. On March 5, 1982, petitioners filed a motion characterized as a motion for grant of immunity which was denied on March 19, 1982. On April 16, 1982, petitioners filed a motion to produce which was denied on April 19, 1982. On April 26, 1982, petitioners filed a motion to compel answers to interrogatories which was withdrawn by motion granted October 18, 1983. On April 27, 1982, petitioners filed a motion for summary judgment claiming, in part, that respondent's action in issuing the notice of deficiency was "ultra vires." This motion was denied by order dated November 8, 1984. Prior to the date of this order, petitioners had filed a motion to vacate the notice setting the hearing on their motion

for summary judgment. This motion was denied on May 7, 1982. On May 14, 1982, petitioners filed yet another motion for summary judgment, this time based on their argument that the notice of deficiency as to the taxable years 1975 through 1977, inclusive, was untimely. This motion was denied by order dated November 8, 1984. On October 19, 1983, petitioners filed a motion to dismiss the case with prejudice to respondent. This motion was denied on October 21, 1983. On October 26, 1983, petitioners renewed their motions for summary judgment. These motions were denied by Order dated November 8, 1984. Finally, on December 10, 1985, petitioners filed a motion apparently seeking an order by the Court denying consideration of matters relating to the Trust. This motion was denied by Order dated January 23, 1986. Petitioners renewed their motion and the second motion was denied on February 4, 1986.

Petitioners are not unfamiliar with this Court. Currently, they have another case pending before the Court. As in this case, there is an

issue relating to the Trust.

OPINION

Initially, we must consider petitioners' jurisdictional objection. Petitioners, in their "Motion to Dismiss" filed on December 10, 1985, raised a similar argument. By Order dated January 23, 1986, we denied petitioners' motion. In the accompanying Memorandum Sur Order we explained:

> Our jurisdiction to make a determination is limited by statute. Sec. 7442, Internal Revenue Code of 1954, as amended. Except for certain declaratory judgment and disclosure actions, the issuance of a notice of deficiency or notice of liability is a prerequisite to Tax Court jurisdiction. Medeiros v. Commissioner, 77 T.C. 1255, 1260 (1981). However, the fact that we do not have jurisdiction to determine a particular taxpayer's liability does not preclude consideration of that taxpayer in relation to a determination of the liability of a taxpayer for which we do have jurisdiction. See, e.g., Lerner v. Commissioner, 71 T.C. 290 (1978); Malkan v. Commissioner, 54 T.C. 1305 (1970); Friedman v. Commissioner, 41 T.C. 428 (1963), affd. 346 F.2d 506 (6th Cir. 1965).
>
> Here, we do not have jurisdiction to make a determination as to the fact or amount of any deficiency in the Federal income tax liability of the trust as the trust is not properly before us as a party. We may, however, to the extent relevant to the determination of any deficiency

for the parties who are before us, consider issues relating to the trust.

There has been no change in our jurisdictional authority since the date of the Memorandum Sur Order, and we must reject petitioners' argument that we are without jurisdiction to consider issues relating to the Trust.[4]

We must next consider petitioners' claim that the notice of deficiency was not timely as to 1975 and 1976. Petitioners have the burden of proving that the normal period of limitation

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[4] In a prior proceeding involving this case, we denied the Trust's petition to intervene. Sampson v. Commissioner, 81 T.C. 614 (1983). In that case we stated at 617-618: "In seeking to intervene herein, the trust is seeking to inject into the present case issues relating 'to the rights and interests of the Trust, particularly, questions which address the very existence and propriety of the Trust.' The trust also seeks to raise issues herein concerning the individual property rights and interests of trustees and beneficiaries, presumably including the present petitioners, in and to trust property. None of these matters, however, are properly before this Court as issues, nor do they form a necessary part of any of the issues which we must decide in rendering a decision in this case." [Footnote reference omitted.]

expired prior to the issuance of the notice of deficiency, and respondent has the burden of proving the applications of any exception to the normal period of limitation. Miami Purchasing Service Corp. v. Commissioner, 76 T.C. 818, 823 (1981); Robinson v. Commissioner, 57 T.C. 735, 737 (1972). Generally, the notice of deficiency must be issued within three years after the return was filed. Sec. 6501(a); sec. 6213(a). Section 6501(e) provides an exception to the general rule and states, in pertinent part:

(e) SUBSTANTIAL OMISSION OF ITEMS.-- Except as otherwise provided in subsection (c)—

(1) INCOME TAXES.—In the case of any tax imposed by subtitle A--

(A) GENERAL RULE.--If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed * * * at any time within 6 years after the return was filed. For purposes of this subparagraph--

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

The Supreme Court enunciated the basic test which was codified in section 6501(e)(1)(A)(ii). Colony, Inc. v. Commissioner, 357 U.S. 28 (1958). In that case the Supreme Court stated:

We think that in enacting [section] 275(c) [now section 6501(e)] Congress manifested no broader purpose than to give the Commissioner an additional two years [now three years] to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage. And this would seem to be so whether the error be one affecting "gross income" or one, such as overstated deductions, affecting other parts of the return.* * *(Emphasis added.)

Colony, Inc. v. Commissioner, supra at 36. We have further stated that "this does not mean

simply a 'clue' which would be sufficient to intrigue a Sherlock Holmes" but "neither does it mean a detailed revelation of each and every underlying fact." George Edward Quick Trust v. Commissioner, 54 T.C. 1336, 1347 (1970), affd. 444 F.2d 90 (8th Cir. 1971). In some circumstances a related tax return may be considered. See, e.g., Davenport v. Commissioner, 48 T.C. 921, 928 (1967); Roschuni v. Commissioner, 44 T.C. 80, 84 (1965).

Here, even assuming that the Trust returns are properly considered, petitioners' disclosure of the fact of income from the Trust was not sufficient to give respondent a clue as to the existence of additional omitted income. Neither the Trust returns nor petitioners' individual returns disclosed the fact that William was purportedly employed by the Trust as an

independent contractor.[5] The Trust returns did state that the Trust was engaged in a business, but did not identify which business it was engaged in. The only hint which respondent had that petitioners had omitted items of gross income was the fact that William's profession was listed as osteopath on petitioners' 1976 income tax return and yet there was no entry for income from salary or wages or trade or business income. We decline to find that this was a sufficient "clue" as to the existence of the omitted income.

The amount of gross income reported on the Trust income tax returns was $12,500.00 as income from the Corporation and $18,049.70 as business receipts in 1975 and $23,765.24 as income from the Corporation and $31,414.67 as business receipts in 1976. As subsequently discussed, we have determined that this income was actually

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[5] The fact that William was listed as a nominee in these returns was not sufficient to disclose the fact of employment as this designation could simply mean that bank accounts were held in his name.

earned by William. The amount of gross income reported on petitioners' income tax returns was $19,884.46 in 1975 and $8,389.79 in 1976. Clearly, the amount omitted from petitioners' gross income was in excess of 25 percent of the amount of gross income stated in the returns. Respondent did not have a sufficient clue as to the omitted income. Consequently, the six year statute of limitations is applicable for petitioners' taxable years 1975 and 1976. Petitioners' returns are deemed to have been filed no earlier than April 15, 1976, and April 15, 1977, respectively, pursuant to section 6501(b)(1), and a notice of deficiency issued on January 26, 1981, is within six years of both dates.

We must next consider whether the income reported on the Federal income tax returns of the Trust is properly reportable on petitioners' individual income tax return for each of the years at issue. This case presents yet another situation in which petitioners have used a trust

device to avoid the incidents of taxation on their earnings. See e.g., Hanson v. Commissioner, 696 F.2d 1232 (9th Cir. 1983); Schulz v. Commissioner, 686 F.2d 490 (7th Cir. 1982); Vnuk v. Commissioner, 621 F.2d 1318 (8th Cir. 1980); Vercio v. Commissioner, 73 T.C. 1246 (1980); Markosian v. Commissioner, 73 T.C. 1235 (1980).[6]

A taxpayer cannot escape taxation by an assignment of his or her income to another entity. Lucas v. Earl, 281 U.S. 111, 114-115 (1930). A fundamental principle of our income tax laws is that income is taxed to the one who earns it, Commissioner v. Culbertson, 337 U.S. 733, 739-740 (1949), and taxation cannot be avoided by diverting the income to another entity, for example to a trust, as in the instant case. United States v. Basye, 410 U.S. 441, 450 (1973).

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[6] See also Whitesel v. Commissioner, T.C. Memo. 1983-9, affd. without published opinion 745 F.2d 59 (6th Cir. 1984).

A key factor in determining whether compensation for services performed by an individual is in fact earned by the individual and not by a trust entity for which these services are purportedly performed is the existence of ultimate control and direction over the earning of the compensation. Vercio v. Commissioner, supra, at 1254. The Court will look beyond mere "paper transactions" which have no effect on economic reality. Markosian v. Commissioner, supra, at 1241.

Here, it is clear that nothing was changed by the interposition of the Trust between petitioners and William's osteopathic practice except the manner and amount of income which petitioners reported for Federal income tax purposes. There is absolutely no evidence in the record that any formalities other than signing the documents which were admitted into evidence and submitting separate Federal income tax returns for the Trust were undertaken. The persons who were intended to benefit from the

Trust were also the trustees of the Trust. There was no independent fiduciary who might require that the Trust terms were complied with. In addition petitioners continued to live in their residence which had been transferred to the Trust and to pay their living expenses, albeit now from the Trust. Finally, it is clear that William had complete control and direction over the income which was earned by his osteopathic services. P ursuant to the purported agreement between the Trust and the Corporation, the Trust was to receive 82 percent of the income earned by William. The purported agreement between th Trust and William essentially provided that the Trust would pay petitioners' living expenses as compensation for the services which he provided to the Corporation. Under these arrangements, it would be William's decision as to whether he wished to perform the services which would generate income for the Corporation and the Trust and ultimately result in the payment of petitioners' living expenses.

Under these circumstances we an only conclude that William was the true earner of the income reported on the Federal income tax returns of the Trust. Although the Trust claimed deductions which were disallowed by respondent, petitioners offered no evidence that these deductions represented anything other than nondeductible, personal expenditures. Consequently, we sustain respondent's determination that William actually earned the income reported on the income tax returns ot the Trust and his disallowance of deductions claimed with respect to that income.

We must next consider whether petitioners are liable for self-employment taxes attributable to the income reported by the Trust. Section 1401 provides for a tax on the self-employment income of every individual. "Self-employment income" is defined generally as "the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business." Secs. 1402(a);

1402(b). The amount of self-employment income subject to the tax is limited to $14,100.00 in 1975, $15,300.00 in 1976, $16,500 in 1977, $17,700 in 1978, and $22,900 in 1979. Sec. 1402(b). Generally, "employees" are not subject to the imposition of the self-employment taxes.

Here, we have concluded that William had additional net income attributable to his osteopathic practice which in each year exceeded the limitation for self-employment taxes. William did not argue that he received this income as an employee. Consequently, we sustain respondent's determination as to the additional self-employment tax liability for each of the years at issue.

We must next consider whether petitioners are liable for the addition to the tax under section 6653(a) for each of the years at issue. Section 6653(a) provides for an addition to the tax if any part of an underpayment is due to negligence or intentional disregard of the rules and regulations. Respondent's determination that a

part of the underpayment for each year was due to negligence is presumptively correct. Magill v. Commissioner, 70 T.C. 465, 479 (1978), affd. 651 F.2d 1233 (6th Cir. 1981). Petitioners "cannot avoid [their] duty to file accurate returns simply by shifting the responsibility to [their] agents." Enoch v. Commissioner, 57 T.C. 781, 802 (1972). Where tax avoidance is attempted through a family trust device at least one court has stated the "[n]o reasonable person would have trusted this scheme to work." Hanson v. Commissioner, supra, at 1234.

Here, a certified public accountant prepared petitioners' 1975 and 1976 Federal income tax returns and 1975 and 1976 Federal income tax returns of the Trust. The manner in which income and deductions were reported on these returns and the other returns filed by petitioners and the Trust resulted in deductions for petitioners' nondeductible personal expenditures for their residence and medical expenses on their Trust's Federal income tax returns. These amounts were

not reported as income on petitioners' Federal income tax returns. In effect the manner in which the income and deductions were reported caused petitioners' income, in part, to "disappear." The record does not indicate whether the certified public accountant who prepared the 1975 and 1976 returns was aware of the underlying facts.[7] However, William was an educated individual and was undoubtedly aware that he was not properly reporting his income and deductions in any of the years at issue. Consequently, we must sustain respondent's determination that petitioners are liable for the addition to the tax under section 6653(a) for each of the years at issue.

We must next consider whether petitioners are

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[7] It is unclear whether Jay Q. Truxal, the certified public accountant who prepared the 1975 and 1976 Federal income tax returns, and Lelah M. Truxal, one of the original trustees of the Trust, were also petitioners in Truxal v. Commissioner, T.C. Memo. 1982-616, a case involving a similar trust arrangement to the one under consideration.

liable for the addition to tax under section 6654(a). Section 6654 provides, in pertinent part:

(a) ADDITION TO THE TAX.--In the case of any underpayment of estimate tax by an individual, * * *, there shall be added to the tax under chapter 1 and the tax under chapter 2 for the taxable year an amount determined at an annual rate established under section 6621 [prior to July 1, 1975, the rate was six percent per annum] upon the amount of the underpayment (determined under subsection (b)) for the period of the underpayment (determined under subsection (c)).

(b) AMOUNT OF UNDERPAYMENT.--For purposes of subsection (a), the amount of the underpayment shall be the excess of --

(1) The amount of the installment which would be required to be paid if the estimated tax were equal to 80 percent * * * of the tax shown on the return for the taxable year, * * * over

(2) The amount, if any, of the installment paid on or before the last date prescribed for such payment. [Emphasis added.]

Tax shown on the return" does not mean the tax based on actual income for the year as ultimately determined, cf. Evans Cooperage Co., Inc. v. United States, 712 F.2d 199, 205 (5th Cir. 1983), (involving section 6655) and a similar

interpretation is applicable to section 6654(b) which also uses "the tax shown on the return" as the basis for determining the installment due.[8]

Here, petitioners reported the following amounts as their tax liability for the years at issue:

Year	Amount
1975	$632.06
1976	270.24
1977	-0-
1978	-0-
1979	-0-

Respondent determined additions to the tax under section 6654(a) for each of these years. However, it is clear that respondent did not properly compute the amount of the underpayment based on the "tax shown on the return for the taxable year." Consequently, we do not sustain respondent's determination as to the amount of

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[8] See Rev. Rul. 83-36, 1983-1 C.B. 358.

the addition to the tax under section 6654(a).[9]

Finally, we must consider whether damages should be awarded to the United States under section 6673. Section 6673 provides:

> Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Secretary and shall be collected as part of the tax.

Section 6673 is applicable to any action or proceeding pending in this Court on or after November 15, 1985. Sec. 160, Deficit Reduction Act of 1984, Pub. L. 98-369, 96 Stat. 696.

Here, we reluctantly conclude that it is not appropriate to award damages to the United States. While we believe that petitioners, in

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[9] The computation of the amount of the addition to the tax under sec. 6654(a) shall be made pursuant to Rule 155.

substantial part, did not intend to proceed with a meritorious action in this Court, we note that there was a jurisdictional issue for taxable years 1975 and 1976.[10]

To reflect the foregoing,

Decision will be entered under Rule 155.

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[10] Adjustments in petitioners' favor will not necessarily preclude an award of damages. See Piche v. Commissioner, T.C. Memo. 1986-29.

APPENDIX D

WILLIAM C. SAMPSON AND LUCILLE A. SAMPSON, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 3394–81. Filed September 22, 1983.

After the parties herein were at issue, but before trial, T, a third party to whom no statutory notice had been issued, moved to enter the case as a party petitioner. The motion was denied without explanation, and T appealed to the Court of Appeals, which vacated the order and remanded the case for this Court to state the basis of the denial. Upon remand, *Held*, that T, not having been issued a notice of deficiency, may not enter the instant case as a party petitioner. *Held, further*, that in appropriate circumstances, such a third party may be allowed to enter the case as an intervenor, in the proper exercise of the Court's discretion. *Held, further*, that in the present case, T has no justiciable interests which can or should be decided by the Court as part of the issues which are before it. Intervention accordingly denied.

Michael G. Parham, for Lucille A. Sampson Pure Equity Trust, applicant for intervention.

OPINION

KÖRNER, *Judge*: This case is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. The circumstances are as follows.

Respondent issued his statutory notice of deficiency to petitioners for their calendar years 1975 through 1979. His principal determination for each year, and the only one which concerns us here, was that certain income, reported in the years in question by the Lucille A. Sampson Pure Equity Trust (hereinafter the trust), should properly have been reported by petitioners in each year, and was accordingly to be added back to their taxable income. Respondent's said determination was stated to be based upon any one or more of the following theories:

a. That said income was taxable to petitioners under the authority of section 671[1] of the Internal Revenue Code;

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[1]Unless otherwise noted, all statutory references herein are to the Internal Revenue Code of 1954 as in effect in the years in issue; and all references to Rules are to the Rules of Practice and Procedure of this Court.

b. That the creation of the trust, and the assignment of certain income and deduction items to it, constituted a sham transaction which was not recognizable for Federal income tax purposes; and

c. That the income in question was attributable to petitioners under section 61.

Petitioners timely filed a petition with this Court, putting the above adjustments in issue, as well as all other adjustments made by respondent's statutory notice. Petitioners also affirmatively raised the issue of the statute of limitations with respect to the years 1975 through 1977.

After the pleadings were closed and the parties were at issue, the trust, by its separate counsel, filed a petition to intervene as a party petitioner in this case.[2] In support of the proposed intervention, the trust alleged:

> 5. That the Notice of Deficiency herein raises issues of law and questions of fact which are material to the rights and interests of the Trust, particularily, [sic] questions which address the very existence and propriety of the Trust.
>
> 6. That The Commissioner has failed and neglected to mail a Notice of Deficiency to the Trust, or any officer or employee thereof, which would make the Trust a party to the action according to law, thereby depriving the Trust of standing to protect the interests of the beneficiaries.
>
> 7. That the refusal of the Commissioner to notify the Trust, or any officer or employee thereof, of a tax deficiency according to law, operates to deny the Trust equal access to the Courts for the purpose of protecting its justiciable interests, as well as the individual interests of the adverse trustees and beneficiaries, in violation of the Fifth Amendment protection of Due Process of Law.

None of the alleged adverse trustees or adverse beneficiaries sought leave to intervene individually.

The Court denied the petition to intervene, without explanation.

The trust then took a timely appeal to the Court of Appeals for the Sixth Circuit. In its opinion, filed June 23, 1983,[3] the

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[2]Both petitioners, as well as separate counsel for the applicant, consistently refer to the applicant as a trust, and we will so refer to it here for convenience. Our use of the term, however, is not to be construed as a finding or holding that the applicant is a trust which is valid either for Federal tax or State law purposes. These are questions on which we presently express no opinion.

[3]710 F.2d 262 (6th Cir. 1983).

Court of Appeals held that this Court has the authority, under appropriate circumstances, to allow intervention in an existing case by those who have not been served with a notice of deficiency. It was emphasized that the intervention by such third parties is not a matter of right, but is in the sound discretion of the Tax Court, and would be reviewable by appellate courts under an abuse of discretion standard. However, since this Court's denial of the petition to intervene was not explained in the record, and since the Court of Appeals apprehended that we may have denied the petition under the mistaken belief that we lacked power to permit intervention, our order denying the motion to intervene was vacated, and the case was remanded to us, so that we could exercise our discretion herein and determine whether there exist sufficient grounds for intervention by the trust.

It is clear that the case is not being remanded to us for the purpose of determining whether the trust should be admitted as a party petitioner. We have specifically held that no one who has not been served with a statutory notice of deficiency may become a party petitioner in this Court (*Cincinnati Transit, Inc. v. Commissioner*, 55 T.C. 879 (1971)), and that holding was specifically approved by the Court of Appeals for the Sixth Circuit on appeal, 455 F.2d 220 (1972). See also *Guarino v. Commissioner*, 67 T.C. 329, 331 (1976); *Estate of Smith v. Commissioner*, 77 T.C. 326, 329 (1981). Such a holding is clearly in accordance with our practice, and with the statute defining and limiting our jurisdiction. Sec. 6213(a); Rule 60(a). It is therefore clear that in no event can the Trust be allowed to intervene herein *as a party petitioner*. However, in *Cincinnati Transit, Inc. v. Commissioner*, *supra*, we recognized that "There is a sound distinction between permitting a third party to 'intervene' or file an amicus brief to protect its interests, which we think would be discretionary at best under these circumstances, and permitting a party to join as a party petitioner in a proceeding to redetermine someone else's tax liability." 55 T.C. at 883. In affirming our decision in *Cincinnati Transit, Inc. v. Commissioner*, *supra*, the Court of Appeals noted this distinction, and in its opinion in the instant case has specifically approved it. We are thus called upon to determine here only whether the trust should be allowed the status of intervenor, rather than that of a party petitioner.

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Our right to allow third-party intervention on this limited basis is recognized by this and other courts. See *Estate of Dixon v. Commissioner*, 666 F.2d 386 (9th Cir. 1982); *May v. Commissioner*, 553 F.2d 1207 (9th Cir. 1977); *Levy Trust v. Commissioner*, 341 F.2d 93 (5th Cir. 1965); *Estate of Smith v. Commissioner*, 77 T.C. at 329; *Louisiana Naval Stores, Inc. v. Commissioner*, 18 B.T.A. 533 (1929). Where a person has an interest in the controversy which is contrary to that of the parties and which might not be protected in the proceeding, or where intervention is necessary to administer justice, this Court can allow such intervention as a matter of discretion. *Estate of Smith v. Commissioner, supra* at 329; *Cincinnati Transit, Inc. v. Commissioner, supra*; *Central Union Trust Co. v. Commissioner*, 18 B.T.A. 300 (1929).

Many years ago, we had occasion to consider the proper standard to be applied in exercising our discretion whether or not to permit a third party to intervene in a case before us. In *Pitts v. Commissioner*, 26 B.T.A. 312 (1932), we applied the standard enunciated in *Smith v. Gale*, 144 U.S. 509 (1892), in which the Supreme Court said:

> In *Horn v. Volcano Water Company*, 13 California, 62, 69, the Supreme Court of California had occasion to construe a similar provision of the Code of that State, and held, speaking through Mr. Justice Field, now a member of this court, that "the interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment * * *. To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation." [144 U.S. at 518.]

Application of the above principles to the instant question provides a clear answer.

In seeking to intervene herein, the trust is seeking to inject into the present case issues relating "to the rights and interests of the Trust, particularly, questions which address the very existence and propriety of the Trust." The trust also seeks to raise issues herein concerning the individual property

rights and interests of trustees and beneficiaries, presumably including the present petitioners, in and to trust property.[4] None of these matters, however, are properly before this Court as issues, nor do they form a necessary part of any of the issues which we must decide in rendering a decision in this case.

This Court is a court of limited jurisdiction, created to resolve controversies between taxpayers and the Commissioner with respect to liability for certain specific types of Federal taxes. Sec. 7442; *Estate of Smith v. Commissioner*, 638 F.2d 665, 669 (3d Cir. 1981); *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971). It is doubtful that we have jurisdiction to decide controversies between private parties with respect to rights to property. See *Northern Pipe Line Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In the present case, the controversy involves petitioners' liability for Federal income tax, based upon respondent's determination that certain specified income was properly taxable to them rather than to the trust.[5] In making this determination, Federal law controls. State law may determine the rights to property (see *Poe v. Seaborn*, 282 U.S. 101 (1930)), but Federal law determines how and to whom such rights are to be taxed (*Tower v. Commissioner*, 327 U.S. 280 (1946); *Lucas v. Earl*, 281 U.S. 111 (1930)), and in making the determination of Federal tax liability, State law controls only when it is made applicable by specific act or necessary implication. *Burnet v. Harmel*, 287 U.S. 103 (1932).

In the instant case, the validity of the trust, and the rights of the various trustees and beneficiaries thereof under State law, are not determinative of the Federal income tax results with respect to the alleged trust income. The trust here may or may not be valid and enforceable under State law, and the income allegedly reported by it may be distributable as a State court may determine in a proper proceeding, but State property law is not controlling as to who should pay the Federal tax on the income derived from such property. *Schulz*

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[4] See the relevant portion of the trust's petition to intervene, quoted *supra*.

[5] The trust does not contend, indeed denies, that respondent is asserting any liability against it for taxes with respect to the income in question.

v. Commissioner, 686 F.2d 490 (7th Cir. 1982); *Horvat v. Commissioner*, T.C. Memo. 1977-104, affd. 671 F.2d 990 (7th Cir. 1978), cert. denied 440 U.S. 959; *Vercio v. Commissioner*, 73 T.C. 1246 (1980); *Markosian v. Commissioner*, 73 T.C. 1235 (1980).

It is clear, therefore, that a determination of the property rights of the trust and its various trustees and beneficiaries in and to trust property under State law is not necessary to our decision of the issues which are presented to us, and there is no decision or judgment which this Court could render with respect to such matters which would be binding on such other parties. See *Cincinnati Transit, Inc. v. Commissioner*, *supra* at 883. The trust, accordingly, has no justiciable interests which this Court needs or has power to adjudicate in the present proceeding, and the trust's petition to intervene is accordingly denied. See *Levy Trust v. Commissioner*, *supra*; *Estate of Dixon v. Commissioner*, *supra*; *Pitts v. Commissioner*, *supra*; *Estate of Smith v. Commissioner*, *supra* at 331–333.

An appropriate order will be entered.

W. C. & A. N. Miller Development Company, Petitioner *v.* Commissioner of Internal Revenue, Respondent

Docket No. 10934–78. Filed September 26, 1983.

M Company was engaged in the business of developing real estate which it had acquired and upon which it constructed single-family, detached homes. It filed a Form 970—Application to Use LIFO Inventory Method. M Company applied to use a LIFO method in accounting for its completed homes and homes under construction, exclusive of land costs. Such method was to be used by M Company beginning with its 1974 fiscal year. For its fiscal year ended Sept. 30, 1973, and prior years, M Company has accounted for its construction costs using a job cost method. Under this method, each home was treated as a separate costing unit with all direct costs charged to the particular home and with variable overhead costs and construction and architectural overhead costs being assigned to each home ratably. All of the accumulated costs for a particular home were then charged to M Company's cost of sales at the time the home was sold. Respondent did not consent to M Company's using the LIFO method. M Company, however, used such method in accounting

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No. 87-1733

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM C. SAMPSON, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the Rules of Practice and Procedure of the United States Tax Court violate the Due Process Clause because they did not allow petitioners' family trust to intervene as a party-petitioner in this litigation respecting petitioners' individual federal income tax liability.

1. Petitioners created a "family trust" in furtherance of a scheme to avoid payment of the tax due on the income earned by petitioner William Sampson as an osteopath. That personal income was assigned to the trust, and the trust then purported to deduct petitioners' personal, living, and family expenses as business or administrative expenses of the trust. Pet. App. 32, 33-34. The Commissioner of Internal Revenue issued a notice of deficiency to petitioners in which he determined that the income reported by the trust was instead taxable to petitioners (*id.* at 33). No notice of deficiency was issued to the trust (*id.* at 40).

Petitioners initiated an action in the United States Tax Court for a redetermination of the deficiencies asserted by the Commissioner. During these proceedings, the trust filed a motion to intervene as a party-petitioner in the Tax Court. The Tax Court denied that motion without explanation (see Pet. App. 37), but the court stayed the proceedings to allow the trust to appeal.

The court of appeals vacated the Tax Court's order and remanded for further proceedings (Pet. App. 36-42). Finding the Tax Court's denial of the motion to intervene to be an appealable order (*id.* at 37-40), the court held that the trust could not intervene as a party-petitioner because it had not been issued a notice of deficiency (*id.* at 40).* The court of appeals further held, however, that the Tax Court has discretionary authority to permit intervention as a nonparty (*id.* at 40-41). Because the Tax Court had not given any reason for its denial of the trust's motion to intervene, the court of appeals vacated the Tax Court's order and remanded the case for the court to determine, in the exercise of its discretion, whether intervention by the trust as a nonparty was appropriate (*id.* at 41-42).

On remand, the Tax Court determined that the trust had no justiciable interest in the litigation and, accordingly, denied its request to intervene (Pet. App. 47-52). No appeal was taken from that denial. Thereafter, the Tax Court

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* With certain limited exceptions not pertinent here, it is well settled that only individuals or entities that have been issued a notice of deficiency may appear as party-petitioners in the Tax Court. See 26 U.S.C. 6213; *Laing* v. *United States*, 423 U.S. 161, 165 (1976); *Abrams* v. *Commissioner*, 814 F.2d 1356, 1357 (9th Cir. 1987); *Alford* v. *Commissioner*, 800 F.2d 987, 988 (10th Cir. 1986); *Donley* v. *Commissioner*, 791 F.2d 383, 384 (5th Cir.), cert. denied, 479 U.S. 885 (1986); *Cincinnati Transit, Inc.* v. *Commissioner*, 455 F.2d 220, 221 (6th Cir. 1972); *Medeiros* v. *Commissioner*, 77 T.C. 1255, 1260 (1981).

resumed the trial of petitioners' case and sustained the deficiencies determined by the Commissioner (*id.* at 43-46z). The court held that petitioners' family trust scheme was ineffective to shift to the trust the incidence of the tax on the income earned by William Sampson as an osteopath (*id.* at 46o-46s). The court of appeals affirmed on the basis of the Tax Court's opinion (*id.* at 32-35).

2. Petitioners contend (Pet. 19-28) that the failure of the Tax Court's rules to permit the intervention of the trust as a party violates the Due Process Clause of the Fifth Amendment. At the outset, we question whether this issue is properly before the Court. The trust did not take an appeal from the second order denying intervention and thus was not a party in the court of appeals below. Indeed, the question of intervention was not raised at all on the second appeal. Petitioners have no standing to raise on their own the denial to the trust of the right to intervene, and, as laymen, they cannot be said to be representing the trust in this Court. In any event, petitioners' contention is wholly without merit.

It has been clear since the seminal case of *Lucas* v. *Earl*, 281 U.S. 111 (1930), that, for purposes of the federal tax laws, income is taxable to the person who earns it, regardless of what arrangements he may make to divert the payment of it elsewhere. Indeed, this Court has described this principle regarding "anticipatory assignments of income" as "a cornerstone of our graduated income tax system." *United States* v. *Basye*, 410 U.S. 441, 449-450 (1973). In this case, petitioner William Sampson made an anticipatory assignment of the income earned by him as an osteopath to a trust established for petitioners' benefit. Accordingly, the courts below correctly held (Pet. App. 34-35, 46o-46s) that, under *Lucas* v. *Earl*, *supra*, and its progeny, that income is taxable to him without regard to the validity of the assignment to the

trust under state law. See, *e.g.*, *Neely* v. *United States*, 775 F.2d 1092 (9th Cir. 1985); *Holman* v. *United States*, 728 F.2d 462 (10th Cir. 1984); *Schulz* v. *Commissioner*, 686 F.2d 490 (7th Cir. 1982).

The proceedings in the Tax Court to determine whether the assigned income should be taxable to petitioner William Sampson did not implicate any rights or interests of the trust or its beneficiaries; accordingly, the failure to allow the trust to intervene as a party plainly did not violate due process. As the Tax Court explained (Pet. App. 50-52), its jurisdiction was limited to adjudicating the correctness under federal law of the deficiencies in petitioners' tax asserted by the Commissioner. A determination as to the property rights of the trust and its beneficiaries under state law was not necessary to the Tax Court's decision respecting petitioners' income tax liabilities; consequently, the court's decision could not have any binding effect on the trust or any other parties not before the court, and there was no reason to allow the trust to intervene in the proceedings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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